Letters Submitted on H.R. 4319
Title 46 Codification Bill

1. Maritime Law Association of the United States (June 21, 2004)

   Congratulations for taking on this long-overdue project

2. Federal Maritime Commission (June 23, 2004)

   Enthusiastic support

3. Department of Transportation (July 12, 2004)

   Strong support

4. Department of the Treasury (August 2, 2004)

   No object subject to conditions which have been satisfied

5. Department of Justice (June 30, 2004)

   Raising constitutional objections about existing law

6. Federal Maritime Commission (July 2, 2004)

   Responding to Justice's objections

THE MARITIME LAW ASSOCIATION OF THE UNITED STATES

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June 21, 2004

The Honorable F. James Sensenbrenner
U. S. House of Representatives
Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515-3951

Re: Comments on H.R. 4319

Dear Congressman Sensenbrenner:

Attached are the comments of The Maritime Law Association of the United States (MLAUS) on H.R. 4319, to complete the codification of Title 46, *United States Code*, "Shipping", as positive law. The MLAUS, since its founding in 1899, has been intimately concerned with federal law as it relates to the maritime industry. Through the cooperation fo Mr. Thomas W. Herlihy, Assistant General Counsel for Legislation, U. S. Department of Transportation, we have been involved in this codification effort from its early stages. I wish to take this opportunity to thank Mr. Herlihy and Mr. Richard B. Simpson, Senior Counsel, Office of Law Revision Counsel, U. S. House of Representatives, for the many kindnesses shown to the MLAUS throughout this long project.

You a re to be congratulated for taking on this long-overdue completion of the codification of Title 46, *U. S. Code*. The updating and reorganization of these important provisions will enhance understanding of and compliance with these important laws.

Your bill as drafted has done an excellent job of converting disparate statutes enacted by various Congresses over the past 200 years into a cohesive unit. Attached are some recommendations for relatively minor changes that we believe will further these efforts.

Please feel free to contact me directly if you have any questions regarding our comments or if we can be of additional assistance.

Sincerely,

Thomas S. Rue, President
The Maritime Law Association of the United States

TSR:hs
Enclosures
bc: Dennis L. Bryant, Esq. w/encl.
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281053.WPD

Federal Maritime Commission
Washington, D.C. 20573

Office of the Chairman

June 23, 2004

The Honorable F. James Sensenbrenner, Chairman
Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515-6216

Dear Chairman Sensenbrenner,

This is in response to the invitation for comment on H.R. 4319, a bill to complete the codification of title 46, United States Code, "Shipping", as positive law. On behalf of the Federal Maritime Commission, I offer my enthusiastic support for this legislation.

As the administrators of the Shipping Act of 1984, as amended by the Ocean Shipping Reform Act, 46 U.S.C. app. §1701 et seq., this agency greatly appreciates the codification of significant portions of U.S. maritime law into a cohesive and accessible format. While this bill makes no change in the substance of our existing statute, the revisions are certain to provide a level of clarity and organization that will be of great value to the shipping public.

Thank you for the opportunity to comment.

Sincerely,

Steven R. Blust
Chairman

THE SECRETARY OF TRANSPORTATION
WASHINGTON, D.C. 20590

July 12, 2004

The Honorable F. James Sensenbrenner, Jr.
Chairman, Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear ~~Mr. Chairman~~ JFM:

This responds to your recent letter of June 3 inviting the U.S. Department of Transportation to provide you with its views on H.R. 4319, a bill

> To complete the codification of title 46, United States Code, "Shipping", as positive law.

The Department strongly supports H.R. 4319 and greatly appreciates the Committee's efforts to advance this initiative. Title 46 of the United States Code has been partially codified and enacted by Congress into positive law. The partial revision, as it currently exists, was begun in 1983. Certain laws concerning marine safety and maritime liability were codified but overall revision of title 46 was not completed. The extensive portions of title 46 that have not been codified appear as an "Appendix" to the title. Much of the Appendix to title 46, which contains significant aspects of U.S. maritime law, consists of numerous public laws that have been enacted over the last century with little attention to the organization of maritime law as a single body of law. As a result, the current format of title 46 is disjointed, confusing and often without apparent logic. Issues of coastwise trade, for example, are currently found in no fewer than three separate chapters within title 46. Revisions made under this bill would consolidate coastwise trade into one chapter with a logical progression of sections within the chapter.

In addition, many of the laws that comprise the Appendix date back to the late 1800's and early 1900's and are written in language that is archaic and difficult to understand. There is also a significant amount of redundancy and obsolete material within the Appendix. This bill would eliminate redundancies, obsolete provisions and unnecessary archaic verbiage.

Additionally, Government reorganizations, both recent and historic, have made agency references in title 46 inaccurate and misleading. Sporadic and inaccurate references to the Secretary of Commerce and the Department of Commerce have been revised to reflect the reality, since 1981, that the functions of the Maritime Administration reside with the Secretary of Transportation. Additionally, transfer of the Coast Guard and the former U.S. Customs Service, which were previously part of the Department of Transportation and the Department of the Treasury respectively, to the

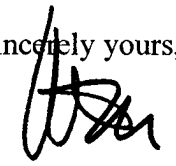
Department of Homeland Security, has necessitated numerous changes in reference to the appropriate Department. Overall, H.R. 4319 makes significant improvements to the organization, accuracy and clarity of title 46.

Despite the broad revisions, it is important to note that section 16(b) of the bill explicitly states that all restated language in the proposal is intended to conform to the understood policy, intent and purpose of the Congress in the original enactments. This provision is critical for the assured continuity of administration for the numerous maritime laws restated in H.R. 4319.

Congress and the Administration are constantly striving to make Government programs that are available to the public, under the law, more accessible and easily understood. This proposal will make it far easier for anyone seeking information under title 46 to find it and make appropriate use of it. The Department of Transportation strongly supports H.R. 4319 and urges swift enactment of the bill.

The Office of Management and Budget has advised that there is no objection, from the standpoint of the Administration's program, to the submission of this letter to Congress. We appreciate the opportunity to comment on this legislation.

Sincerely yours,



Norman Y. Mineta

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

GENERAL COUNSEL

AUG 02 2004

The Honorable F. James Sensenbrenner, Jr.
Chairman, Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This responds to your letter to Secretary Snow requesting the views of the Department of the Treasury on H.R. 4319, "To complete the codification of title 46, United States Code, 'Shipping,' as positive law."

This Department generally defers to the Department of Transportation and other Departments and agencies whose authorities arise out of the provisions of title 46. Nevertheless, the Department of the Treasury is concerned about a number of provisions in the bill. In working with the Office of the Law Revision Counsel (OLRC), however, those concerns have been satisfactorily addressed and we have been assured that the agreements reached in addressing those concerns will be reflected in the amendments to be made when the bill is reported by committee. Specifically, our concerns were with proposed sections 53312, 53502, 53504, and 55304.

Section 53312:

In section 53312 the phrase "notwithstanding any other provision of law," which generally signifies that Congress intends a particular Code provision to take precedence over other Code provisions that may otherwise be construed as being in conflict with it, was deleted as "unnecessary." The phrase is not unnecessary and OLRC had agreed to its reinsertion.

Sections 53502 and 53504:

We were concerned that while the Departments of Transportation and Commerce administer the Capital Construction Fund (CCF) program, sections 53502 and 53504 could undermine Treasury's exclusive jurisdiction over tax issues arising under the CCF program. To address this concern OLRC will add to the section-by-section explanation for section 53501, which will appear in the committee report of the House Judiciary Committee, the following language: "The codification of laws in this chapter is not intended to alter the existing jurisdictional relationship of the Secretaries who administer those laws."

Section 55304:

Section 55304 is a "sense of the Congress" statement whose source is Public Resolution 17 of

March 26, 1934 (46 App. U.S.C. 1241-1). While codification of the Resolution should not change the nature of the Resolution, a guide that does not have the force and effect of law, codification confuses the issue by placing it in the body of the Code. To address this concern OLRC will add to the section-by-section explanation for section 55304 in the committee report the following language: "This section codifies the Joint Resolution of March 26, 1934 (ch. 90, 48 Stat. 500 (also commonly known as Public Resolution 17). The codification of this provision is not intended to change its status as a 'Sense of Congress' provision in any way."

We note that in addition to the foregoing, reference to the Reconstruction Finance Corporation has been deleted from section 55304 as obsolete. We do not have an issue with this deletion.

Given that the Department's concerns will be addressed, we have no objection to H.R. 4319.

Thank you for the opportunity to comment. The Office of Management and Budget has advised that there is no objection to this letter from the standpoint of the Administration's program.

Sincerely,

James W. Carroll, Jr.
Acting General Counsel

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

June 30, 2004

The Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515-6216

Dear Mr. Chairman:

The Department of Justice has reviewed H.R. 4319, a bill to complete the codification of Title 46, United States Code, "Shipping", as positive law. We offer the following comments:

First, 46 U.S.C. § 301 (General Organization) establishes the Federal Maritime Commission as an "independent establishment of the United States Government," and provides: "The Commission is composed of 5 Commissioners appointed by the President by and with the advice and consent of the Senate. Not more than 3 Commissioners may be appointed from the same political party." This Commission exercises "significant authority pursuant to the laws of the United States," *Buckley v. Valeo*, 424 U.S. 1 (1976), so the appointment of its members is subject to the requirements of the Appointments Clause. See U.S. Constitution, art. II, § 2, cl. 2. We believe political affiliation restrictions on the President's constitutional authority to appoint officers of his own choosing and preferences are constitutionally inappropriate when applied to the kind of agency in question here. Although various statutes presently limit the members of any given political party that may be appointed to certain Federal commissions, such requirements are generally necessitated by the special character and responsibilities of the offices to which they apply. Political party restrictions may be relevant, for example, where political balance is required in a commission that regulates partisan political campaigns, where political affiliation is of paramount importance and relevance. See, e.g., 2 U.S.C. § 437c(a)(1) (requiring political balance on the Federal Election Commission); see also 5 U.S.C. App. Section 3 (applying restriction to the appointment of inspectors general). In our view, the political party affiliation restriction here invalidly circumscribes the President's power of appointment because the restriction is not germane to the duties of the Federal Maritime Commission and because of the exceptionally broad executive authority that would be exercised by that Commission.

Second, 46 U.S.C. § 301(b)(3) would provide: "The President may remove a Commissioner for inefficiency, neglect of duty, or malfeasance in office." By limiting the President's power to remove the Commissioners, who collectively exercise substantial executive power, this

provision would interfere with the President's obligation to "take care that the laws be faithfully executed." U.S. Const., art. II, § 3. To be sure, the Supreme Court has upheld a restriction on the President's removal power in certain limited contexts. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). But in *Humphrey's Executor*, the Court employed a functional analysis that turned on its assessment of the nature of independent-agency adjudication: "The commission is to be nonpartisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly quasi judicial and quasi legislative." *Id.* at 624. Whatever the ongoing validity of this reasoning, it is not clear that the many substantial powers of the Federal Maritime Commission fit this description. To avoid raising this constitutional issue, we recommend that this removal restriction be deleted from the bill.

Third, section 306(a) (Annual Report) would require the Commission to submit a report to Congress, which shall include, *inter alia*, "any recommendations for legislation," and section 306(b)(4), more specifically, requires the report to include "any recommendations for additional legislation to offset" certain conditions created by foreign law regarding shipping. To the extent that this provision could be construed to require recommendations for legislation, it would run afoul of the Recommendations Clause. Under Article II, section 3 of the Constitution, the President may recommend for legislative consideration "such measures as he shall judge necessary and expedient. . . ." This clause gives the President exclusive authority to decide whether and when the Executive branch should propose legislation. For this reason, we repeatedly have objected to any attempt by Congress to require the President or his subordinates to submit legislative proposals. While the word "any" in section 306 might be construed to confer the necessary discretion, we nevertheless recommend that the words "that the President shall judge necessary and expedient" be added after the word "legislation" is sections 306(a) and 306(b)(4), to clarify that the provisions are consistent with the Recommendations Clause and to clarify that the decision to recommend legislation remains with the President.

Fourth, 46 U.S.C. § 40705(b) (Presidential review of Commission orders) would authorize the President to stay certain orders of the Commission if he finds that the stay is required for reasons of national defense or foreign policy. It further provides: "During a stay, the President shall, whenever practicable, attempt to resolve the matter by negotiating with representatives of the applicable foreign governments." Likewise, 46 U.S.C. § 41108(c)(2) would provide that "[o]n receiving [a certain] notification, the Secretary of State shall promptly consult with the government of the nation within which [certain] information or documents are alleged to be located for the purpose of assisting the Commission in obtaining the information or documents." These provisions are in serious tension with the Constitution, which commits to the President the primary responsibility for conducting the foreign relations of the United States, see, e.g., *Department of Navy v. Egan*, 484 U.S. 518, 529 (1988) (the Supreme Court has "recognized 'the generally accepted view that foreign policy was the province and responsibility of the Executive'") (quoting *Haig v. Agee*, 453 U.S. 280, 293-94 (1981)), and the exclusive responsibility for formulating the position of the United States in international fora and for

conducting negotiations with foreign nations, see, e.g., *United States v. Louisiana*, 363 U.S. 1, 35 (1960) (the President is "the constitutional representative of the United States in its dealings with foreign nations"); *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 319 (1936) ("[T]he President alone has the power to speak or listen as a representative of the nation ... Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it."). We recommend that these provisions be stricken from the bill or alternatively that the word "shall" be replaced with the word "may" in both provisions.

Fifth, 46 U.S.C. § 40902(c) (Financial Responsibility) would require the Commission to issue regulations, which "shall provide that a [court] judgment for monetary damages may not be enforced except to the extent that the damages claimed arise from the transportation-related activities of the insured ocean transportation intermediary, as defined by the Commission." While Congress has the power to create a rule of decision to this effect, or to delegate to the Commission the power to create such a rule, it is another matter to apply this rule by altering the effect of an Article III judgment. See *Chicago & Southern Air Lines, Inc. v. Waterman S.S Corp.*, 333 U.S. 103, 113 ("Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused full faith and credit by another Department of Government."); see also *United States v. O'Grady*, 22 Wall. 641, 647-48 (1875) ("Judicial jurisdiction implies the power to hear and determine a cause, and ... Congress cannot subject the judgments of the Supreme Court to the re-examination and revision of any other tribunal."); *Hayburn's Case*, 2 Dall. 409, 413 (1792) (opinion of Iredell, J., and Sitgreaves, D.J.) ("[N]o decision of any court of the United States can, under any circumstances, ... be liable to a revision, or even suspension, by the [l]egislature itself, in whom no judicial power of any kind appears to be vested."). We recommend that this provision be recast as a rule of decision by replacing the words "a judgment for monetary damages may not be enforce" with the words "monetary damages shall not be awarded."

Sixth, 46 U.S.C. § 41307(d) (Hearings and Orders) would provide: "The Commission may represent itself in a proceeding under this section in--(1) a district court of the United States, on notice to the Attorney General; and (2) a court of appeals of the United States, with the approval of the Attorney General." Because the Commissioners are not removable at will by the President, see 46 U.S.C. § 301(b)(3), it is constitutionally problematic to vest the Federal Maritime Commission (FMC) with substantial litigating authority on behalf of the United States. Indeed, even if they were removable at will by the President, powerful policy considerations militate in favor of the centralization of Federal litigating authority in the Department of Justice, under the supervision of the Attorney General. See *The Attorney General's Role as Chief Litigator for the United States*, 6 Op. OLC 47, 54-55 (1982). We recommend that the FMC not be granted independent litigating authority at all. At a minimum, we recommend that the approval of the Attorney General be required, both in district courts and circuit courts.

Seventh, section 55305 (Eligible fund deposits) of Chapter 553 (in section 7 of H.R. 4319)

requires that a set amount of certain cargo be transported on United States-flag commercial vessels. Paragraph (c) of section 55305 provides: "The President, the Secretary of Defense, or Congress (by concurrent resolution or otherwise) may waive this section temporarily by-(1) declaring the existence of an emergency justifying a waiver; and (2) notifying the appropriate agencies of the waiver." This provision purports to grant Congress authority to provide a waiver by concurrent resolution, which, although requiring passage by both Houses of Congress, is not presented to the President. Congressional action that has "the purpose and effect of altering the legal rights, duties, and relations of persons, including . . . Executive Branch officials" must comply with the Article I requirements of bicameralism and presentment. *INS v. Chadha*, 462 U.S. 919, 952 (1986); *see also Bowsher v. Synar*, 478 U.S. 714, 733-34 (1986) ("[O]nce Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly-by passing new legislation."). Because Congress lacks constitutional authority to grant such a waiver except by legislative action conforming with Article I, the reference to Congress should be deleted from section 55305(c).

Other Concerns

In section 30904 (Exclusive Remedy), the words, "under any other law" should be deleted. This phrase was not part of the original section 745 which applies only to "any other action arising" out of the same matter for which there is a remedy provided by the "Suits in Admiralty Act" only, and not also "under any other law". It is more than a cosmetic change since, with that addition, a claim for such things as a Title VII right of action, e.g., sexual harassment, which is separate from the Jones Act cause of action arising out of the same matter, would require the United States to be named as the party in lieu of the vessel operator. Title VII is "another law," and is not "a remedy provided by this chapter." Thus a substantive change is being made. Section 30904 should read: "If a remedy is provided by this chapter, an action arising out of the same subject matter may not be brought against an officer, employee, or agent of the United States Government or a federally owned corporation whose act or omission gave rise to the claim."

In sections 30909 (Exoneration and limitation) and 31106 (Arbitration, Compromise, or settlement), the words, "under this chapter" should be deleted from each section. Neither 46 U.S.C.§ 746 or 46 App. U.S.C.§ 789, the bases for these proposed sections, contained the limiting phrase "under this chapter." This addition seems to imply, or could be interpreted to mean, that the United States only has the right to limit liability or claim exoneration in cases where it is first sued. Petitions for limitation or exoneration may be filed before the shipowner is sued. Thus, that right does not only exist for actions "under this chapter." The United States has the right to petition for limitation of liability independent of these sections; therefore, if the phrase is included, that may obscure that right. The purpose of the rewrite is clarification and simplicity, and deleting that phrase achieves that. Sections 30909 and 31106 should read: "In a civil action, the United States Government is entitled to the exemptions from and limitations of liability provided by law to an owner, charterer, operator, or agent

of a vessel."

Thank you for requesting our views on this legislation. If we can be of further assistance on this matter, please do not hesitate to contact us. The Office of Management and Budget has advised that there is no objection to the submission of this letter from the standpoint of the Administration's program.

Sincerely,

William E. Moschella

William E. Moschella
Assistant Attorney General

cc: The Honorable John Conyers, Jr.
Ranking Minority Member

Federal Maritime Commission
Washington, D.C. 20573

Office of the Chairman

July 2, 2004

The Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515-6216

Dear Mr. Chairman:

I would like to present the following response to the comments of the Department of Justice (DOJ) to H.R. 4319. As Chairman Sensenbrenner stated on May 10, 2004, this bill is intended solely as a codification, and "makes no change in the substance of existing law." DOJ's comments go well beyond that objective, and challenge several structural characteristics of the Commission that have been in place since its establishment in 1961. See Reorganization Plan No. 7 of 1961, §§ 102(a), (c) (limited Presidential removal power, and political affiliation restrictions on Commission membership).

At the core of DOJ's comments is disagreement with the Commission's status as an independent agency. Thus, DOJ objects to the bill's continuation of the Commission's authority to represent itself in certain proceedings before the district and circuit courts of the United States. See 46 U.S.C. 41207(d). The independent authority at issue here primarily involves the Commission' s power to seek injunctive relief against agreements it determines to be substantially anticompetitive. Such agreements, it must be noted, are immune from the antitrust laws. Nevertheless, DOJ's proposed amendment to the bill would vest in the Department of Justice the authority to decide when to pursue a suit to enjoin an agreement that DOJ cannot otherwise regulate. This is contrary to Congress's removal of oceanborne transportation agreements from antitrust oversight. It would be counterproductive because the interests of the Commission are not always aligned with those of the Department of Justice. See, e.g., United States v. Federal Maritime Comm'n, 694 F.2d 793, 804 (D.C. Cir. 1982) ("Congress was aware that the Justice Department on occasion had been and would be an adversary of the [Commission] - both as a co-respondent and as a petitioner - and yet evinced no intent to preclude the Department from assuming that role"). This is particularly true when the interests of DOJ as the enforcer of the antitrust laws conflict with the interests of the Commission as the independent agency tasked with regulating antitrust-immune common carriage. See, e.g., United States v. Federal Maritime Comm'n, 503 F.2d 157 (D.C. Cir.) (DOJ challenged FMC's determination to approve merger agreement, arguing that merger should not be immune from the antitrust laws), cert. denied, 419 U.S. 1070 (1974). In this context, Congress has been protective of the litigating authority of independent agencies like the Commission. See, e.g. , Interstate Commerce Commission - Review, P.L. 93-584, H.R. Rep. No. 1569, 93rd Cong. (1974), reprinted in1974 U.S.C.C.A.N. 7025. Finally, although DOJ characterizes the Commission's litigating authority as "constitutionally problematic," the Supreme Court has already expressed approval for litigating authority held by an independent agency. See Federal

Election Comm'n v. NRA, 513 U.S. 88, 96-97 (1994) ("Congress could obviously choose, if it sought to do so, to sacrifice the policy favoring concentration of litigating authority before this Court in the Solicitor General in favor of allowing [an agency] to petition here on its own.").

DOJ also disapproves of the bill's continued requirement that the Commission file an annual report with Congress, including "any recommendations for legislation." I believe that the opportunity to apprise Congress directly of specific legislative recommendations is crucial for the Commission in its role as an independent, expert agency. Indeed, this has been an important feature of the relationship between Congress and the Commission (and its predecessor agencies) for nearly 70 years. See Merchant Marine Act, 1936, § 208, referenced in Reorganization Plan No. 21 of 1950, § 105(5), and incorporated in Reorganization Plan No. 7 of 1961, § 103(e).

In sum, I would like to state my support for the codification as a simple restatement of positive law.

Sincerely,

Steven R. Blust
Chairman